United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

LBUR K. MILLER

Wednesday, June 19, 1963
MMaO
10 00 am

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,487

831

IZELL J. POSTOM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sept. Term, 1962
Argued May 13, 1963

JOHN A. SHORTER, JR.
508 Fifth Street, N. W.
Washington, D. C.

MAURICE R. WEEKS
715 G Street, N.W.
Washington, D.C.

Counsel for Appellant

QUESTION PRESENTED

The question is whether, at a federal criminal trial the Trial Court committed reversible error in permitting the wife of the defendant be called as a witness by the government, be identified as his wife, and start to give testimony before sustaining the objection of the accused.

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT:	
The Trial Court in Permitting the Wife of the Appellant to Testify Over His Objection Prejudiced the Case of the Appellant, and this Constituted Reversible Error	4
CONCLUSION	8

TABLE OF CASES

Bisno v. United States, 299 F. 2d 711 (9th Cir. 1961)	4
Graves v. United States, 150 U.S. 118 (1893)	7
Hawkins v. United States, 358 U.S. 74 (1958)	3, 4, 5, 7
Kotteakos v. United States, 328 U.S. 750	5, 6
Krulewitch v. United States, 336 U.S. 440 (1948)	7
Mills v. United States, 281 F. 2d 736 (4th Cir. 1960)	4
Mullen v. United States, 263 F. 2d 275 (D.C. 1958)	4
Sanchez v. United States, 293 F. 2d 260, 267 (8th Cir. 1961)	6
United States v. Termini, 267 F. 2d 18 (2d Cir. 1959)	4
United States v. Winfree, 170 F. Supp. 659 (E.D. Penn. 1959)	4
Wyatt v. United States, 362 U.S. 525, 526 (1960)	4

MISCELLANEOUS

8 Wigmore, Evidence (3rd Ed.), Sec. 2243, pp. 267, 271 and Sec. 2268, p. 392	7

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO 17,487

IZELL J. POSTOM,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The appellant Izell J. Postom was convicted by the jury in the United States District Court for the District of Columbia in criminal case No. 503-62 upon an indictment charging carnal knowledge. (Title 22 District of Columbia Code, Section 2801).

Upon the said conviction, the Court imposed a sentence of 5 to 15 years. This is an appeal from the said judgment and conviction. The jurisdiction of this Court is invoked under 28 U.S.C. section 1291 and Rule 37 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

The instant cause came on for trial on November 7, 1962, upon an indictment that charged the appellant with carnal knowledge of a 15-year old child named Patricia J. Hall on April 19, 1962. The appellant's defense was that of alibi. He contended that he was at church with his wife when the offense happened. At the trial he so testified and he called many of the members of the church who also testified that he was there with his wife at the time. The appellant did not call his wife as a witness for him.

After the appellant rested his case, the Government proceeded on rebuttal. During these proceedings Government counsel announced that he wished to call the appellant's wife, Mrs. Isabelle Postom, as a witness. At this point the appellant's attorney asked to converse with the Court out of the presence of the jury. This was permitted, and counsel asked the Court to first determine whether Mrs. Postom intended to exercise her privilege not to testify. Counsel asked that the Court do this out of the hearing of the jury. The Court refused to do so and said that it proposed to let the wife take the stand and if defendant-husband objects to her testimony he would sustain the objection and rule that she could not testify.

After this discussion and ruling, the trial resumed.

Under questioning by the Government attorney Mrs. Postom was identified as the appellant's wife. She was asked whether she had a conversation with a certain detective after the offense. The appellant objected. She was next asked whether the conversation was relative to

her husband's whereabouts on the night of the crime. Another objection was made and overruled by the Court. She was next asked about a statement she allegedly signed and affirmed pertaining to her husband's whereabouts on the day the alleged offense took place. At that point, the Trial Court sustained appellant's objection. Mrs. Postom was then excused.

The appellant was found guilty by the jury and on November 30, 1962, was sentenced to a term of five to fifteen years in prison. This appeal follows.

SUMMARY OF ARGUMENT

According to the rationale of the opinion of the Supreme Court in the case of Hawkins v. United States, 358 U.S. 74 (1958), the Trial Court committed plain error when it permitted the appellant's wife to be called to the stand as a Government witness, and to be identified as the appellant's wife. The Trial Court further compounded that error when it permitted the prosecution to question her about a statement she had signed pertaining to her husband's whereabouts on the day that the alleged offense took place.

Appellant urges that the admission of the wife's testimony, as well as her mere presence in the Court room as a Government witness, substantially and improperly influenced the jury. The argument is based on the fact that there is a strong inference created that the wife's testimony would be unfavorable to the appellant.

Thus, although it may be argued that the wife's testimony was, in itself, of little probative value, the error prejudiced the appellant's case, and is of such character as to compel reversal.

ARGUMENT

The Trial Court in Permitting the Wife of the Appellant to Testify Over His Objection Prejudiced the Case of the Appellant, and This Constituted Reversible Error

The Supreme Court in the case of Hawkins v. United States, 358 U.S. 74 (1958) sustained the rule of evidence excluding the adverse testimony of one spouse without the consent of the other spouse.[1] In the Hawkins case, the defendant was charged with a violation of the Mann Act by having transported a girl from one State into another for immoral purposes. The Trial Court, over the defendant's objection, permitted the Government to use his wife as a witness against him. Her testimony was to the effect that she was a prostitute before and after her marriage. The defendant was found guilty.

On certiorari, the Supreme Court reversed the conviction on the ground that the rule prevailing in the Federal courts bars the testimony of one spouse against the other unless both consent.

It was further held by the Court that the wife's testimony though in part cumulative, may have substantially influenced the jury. The Supreme Court also noted that the mere presence of a wife as a witness against her husband would most likely impress the jurors adversely.

Appellant urges that the holding in the Hawkins case controls the disposition of the instant appeal. At the trial of the instant cause, the Court below had to decide, whether in view of the appellant's objection, his wife, Mrs. Postom, should be permitted to testify.

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[1] See Wyatt v. United States, 362 U.S. 525, 526 (1960); Mullen v. United States, 263 F.2d 275 (D.C. 1958); United States v. Termini, 267 F.2d 18 (2d Cir. 1959); Mills v. United States, 281 F.2d 736 (4th Cir. 1960); Bisno v. United States, 299 F.2d 711 (9th Cir. 1961); United States v. Winfree, 170 F.Supp. 659 (E. D. Penn. 1959).

In reaching his decision, the Court cited the Hawkins case and accurately restated the principle when he said:

> ". . . Hawkins versus The United States . . . held that . . . even though the wife was competent to testify . . . the defendant could object and the wife would not be permitted to testify."

Nevertheless, it appears that while cognizant of the rule excluding the testimony of one spouse without the consent of the other, the Trial Court attempted to effect a compromise of its application. The Court determined that it would permit Mrs. Postom to be called as a Government witness, and that at a point during her testimony he would sustain the appellant's objections.[2]

Accordingly, Mrs. Postom was called and identified as the appellant's wife, and was further permitted to testify that upon questioning by detectives she had signed a sworn statement as to her husband's whereabouts on April 19, 1962 (the night of the offense).

In view of the principle firmly announced by the Supreme Court in the Hawkins case, appellant feels that no lengthy argument is here required to show that the Court below committed plain error in permitting the appellant's wife to testify. It is here argued that the Trial Court's error substantially prejudiced the appellant and was of such character as to compel reversal.

The guiding rules for the consideration of error were set forth by the Supreme Court in Kotteakos v. United States, 328 U.S. 750, also cited by the Supreme Court in the Hawkins case in support

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[2] "THE COURT: I will tell you what I am going to do. I will work this out my own way because I cannot find any authority for it, and this is a very serious case. I am going to let you put her on. I am going to let you identify her as the wife. I am going to let you put the first question to her, and at that time if the defendant objects, I am going to advise her that the statutory privilege is that she does not need to testify, and then I am going to rule that in the light of the Hawkins case, because of defendant's objection, she cannot testify."

of its determination that the admission of the wife's testimony was prejudicial.[3]

In discussing the effect of error on the minds of the jury, the Supreme Court in the Kotteakos case stated:

> ". . . To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. United States v. Socony-Vacuum Oil Co. supra (310 U.S. at 239, 242, 84 L ed 1176, 1178, 60 S Ct. 811). In criminal causes that outcome is conviction. This is different, or may be from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf United States v. Socony-Vacuum Oil Co. supra (310 U.S. at 239, 242, 84 L ed 1176, 1178, 60 S Ct. 811); Bollenbach v. United States, supra (326 U.S. 607, ante, 350, 66 S Ct. 402).
>
> "This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record."

In keeping with the Kotteakos principles, as stated above, it must at once be recognized that although the testimony given by the appellant's wife was in itself of little probative value, it cannot be determined that it did not affect the decision of the jurors. Hence, it should be regarded as reversible error. (Indeed it is not within

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[3] See Sanchez v. United States, 293 F.2d 260, 267 (8th Cir. 1961).

the province of an appellate court to speculate as to the probable weight of such an error, on the minds of the jurors, once it is demonstrated that the possibility of prejudice has occurred.) Where the testimony of the wife was in part only cumulative, the Supreme Court has stated:

> " . . . we can not be sure that her evidence . . . did not tip the scales against [the] petitioner . . ."[4]

Appellant further urges that the mere calling of the appellant's wife was reversible error, in itself, because of the inference (arising from being called by the Government) that her testimony would be damaging to appellant. See Graves v. United States, 150 U.S. 118 (1893). 8 Wigmore, Evidence (3rd ed.) section 2243 pp. 267, 271 and section 2268 p. 392.

At the trial of the instant cause, appellant objected to the Government's proffer of evidence through the wife's testimony before she was actually brought to the stand. In view of the Hawkins decision and in view of the dictates firmly imbedded in our system of criminal procedure, it was incumbent upon the Trial Court to not indulge in conduct obviously prejudicial to the appellant. Inasmuch as appellant made timely objection, Mrs. Postom should have not even been permitted to take the stand.

As was noted by the Supreme Court in Hawkins, the "mere presence of a wife as a witness against her husband in a case of this kind would most likely impress jurors adversely."[5]

Finally, it must here be noted that in Krulewitch v. United States, 336 U.S. 440 (1948), the Government argued that even without

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[4] Hawkins v. U.S., cited supra, at page 80.

[5] Supra, at page 80. Emphasis ours.

testimony erroneously admitted, the case against the petitioner was so strong as to render the error harmless. The Court rejected this argument, stating:

> "We cannot say that the erroneous admission . . . may not have been the weight that tipped the scales against petitioner." (336 U.S. at page 445.)

CONCLUSION

WHEREFORE, it is urged that the Trial Court committed prejudicial error in permitting the appellant's wife to take the stand and to testify over his objection. This error warrants and justifies a reversal of the conviction of the appellant Izell J. Postom in this case.

Respectfully submitted,

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MAURICE R. WEEKS
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Washington, D.C.

Counsel for Appellant

INDEX

		Page
Indictment, Filed June 4, 1962		1
Plea of Defendant, Filed June 8, 1962		1
Excerpts from Transcript of Proceedings, November 8, 1963		2
Witnesses:	Tr. Page	
Isabelle Postom Direct	6	5
Judgment and Commitment, Filed December 3, 1962		9
Notice of Appeal, Filed December 7, 1962		10

JOINT APPENDIX

[Filed in Open Court June 4, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on May 1, 1962

THE UNITED STATES OF AMERICA	)	Criminal No. 503-62
	)	
v.	)	Grand Jury No. 460-62
	)	
IZELL J. POSTOM	)	Violation: 22 D.C.C. 2801 (Rape) (Carnal Knowledge)

The Grand Jury charges:

On or about March 10, 1962, within the District of Columbia, Izell J. Postom had carnal knowledge of a female named Doris A. Stewart, forcibly and against her will.

SECOND COUNT:

On or about April 19, 1962, within the District of Columbia, Izell J. Postom carnally knew and abused a female child named Patricia J. Hall, who was then under sixteen years of age, that is to say, about fifteen years of age.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

[Filed June 8, 1962]

PLEA OF DEFENDANT

On this 8th day of June, 1962, the defendant Izell J. Postom, appearing in proper person and by his attorney, Maurice R. Weeks,

being arraigned in open Court upon the indictment, the indictment being read to him, pleads not guilty thereto.

By direction of

MATTHEW F. MC GUIRE
Presiding Judge
Criminal Court # Assign.

* * *

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Testimony of Mrs. Isabelle Postom

1

Washington, D.C.
November 8, 1962

The above-entitled matter came on for further trial before THE HONORABLE WILLIAM B. JONES, United States District Judge, commencing at 10:10 a.m.

* * * * *

2 MR. BLACKWELL: At this time, if Your Honor please, the Government wishes to call as its next rebuttal witness Mrs. Isabelle Postom.

MR. SHORTER: Your Honor, may we come to the bench?

THE COURT: Yes.

(At the bench:)

MR. SHORTER: Could we ask Your Honor to determine this witness' intention to exercise her privilege out of the presence of the jury?

THE COURT: I have been troubled about this, gentlemen. We spent some time studying this in chambers last evening and this morning anticipating the problem would come up.

You heard the request made, Mr. Blackwell?

MR. BLACKWELL: Yes; I heard the request made, Your Honor. I take the position, in view of the fact this witness was identified on voir dire as a witness who would be called on behalf of the defendant, and various witnesses have taken the stand and every one has mentioned the fact that they saw Mrs. Postom come to church with her husband that night, or saw her in church on one side of the church while he sat

3 on the other, and in view of the fact she has been identified as a witness in this case, she is entitled to be called as any other witness in the presence of the jury, Your Honor, and if she wishes to exercise her statutory privilege it should be done in open court, because the jury will now be wondering what happened in the case.

THE COURT: Suppose, Mr. Blackwell -- let's go one step further -- suppose she says I refuse to testify. Suppose at that time counsel for the defendant say we object to her testimony?

MR. BLACKWELL: They can't object. The statute explicitly states --

MR. WEEKS: Who says we can't object?

MR. BLACKWELL: I mean they can object but there is no basis for it. Under the statute one spouse is competent to testify against another spouse although not compellable.

THE COURT: Is there any construction of that? I cannot find it in the District of Columbia.

MR. BLACKWELL: It is in the statute.

THE COURT: That is the trouble, the words are there, but I think in Hawkins versus The United States, Justice Black's opinion in 1958 -- I think it was with respect to a white slavery operation between

4 Texas or Oklahoma and Kansas, or something, where Mr. Justice Black -- and I believe it was the whole court -- I believe Mr. Justice Potter Stewart did write a concurring opinion, but I believe it was a unanimous court -- held that the defendant, even though the wife was competent to testify, could not be compelled to testify, the defendant could object and the wife would not be permitted to testify.

What do you think of that?

MR. BLACKWELL: That the defendant could object?

THE COURT: The defendant could object to his wife testifying against him.

MR. BLACKWELL: We take the position that if a confidential communication would be involved that would be the law, but there is no confidential communication involved here.

THE COURT: It is not that aspect we are going to; it is another problem. I think, following the decisions in this jurisdiction, we find a split in the States, and we find that Justice Black's ruling does not refer to the statute; it refers to common-law rules.

MR. BLACKWELL: Well, it has been an established practice in this jurisdiction.

THE COURT: I will tell you what I am going to do. I will work this out my own way because I cannot find any authority for it, and this is a very serious case. I am going to let you put her on. I am going to let you identify her as the wife. I am going to let you put the first question to her, and at that time if the defendant objects, I am going to advise her that the statutory privilege is that she does not need to testify, and then I am going to rule that in the light of the Hawkins case, because of defendant's objection, she cannot testify.

MR. BLACKWELL: Very well, Your Honor.

THE COURT: Let's leave it that way. It is the only way I can work it out. I realize, Mr. Shorter, it is undesirable also from your point of view to have her on, but I cannot find any other answer to it.

MR. WEEKS: All we are asking Your Honor to do is do as Your Honor so indicated but out of the presence of the jury.

THE COURT: I am going to do a little more.

MR. WEEKS: Mr. Blackwell has said several times that she was identified as one of the witnesses, and he uses the language "will be called." I say the language was, and it is, I think the record shows, "may be called."

THE COURT: Whether that be so or not that is not the problem.

MR. BLACKWELL: I won't quibble over words. I don't insist on that.

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THE COURT: That would not hold in this problem at all, I don't think, Mr. Weeks. Suppose the problem is you never mentioned her in the voir dire examination and the Government had subpoenaed her here. We would have the same problem we have got today. Now the problem, and we have been struggling with it because we cannot find anything -- we do find a split in the States and we do find Hawkins, and I am going to follow the Hawkins rule.

MR. BLACKWELL: It is agreeable to the Government.

(In open Court:)

Whereupon,

ISABELLE POSTOM

called as a witness by the Government in rebuttal, having been first duly affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKWELL:

Q. State your full name, please, madam? A. Isabelle Postom.

Q. Where do you live, Mrs. Postom? A. 322 Peabody Street.

Q. Are you the wife of the defendant in this case? A. Yes; I am.

7

Q. Directing your attention to the 26th day of April, 1962, did you have a conversation with one Detective Wolfgang? A. The 26th?

MR. WEEKS: Objection.

THE COURT: I overrule that objection.

BY MR. BLACKWELL:

Q. Did you have a conversation with Detective Wolfgang of the Sex Squad? A. Well, I don't remember the date but I did have a conversation with him.

Q. All right. Well now, may I refresh your recollection by asking you if it was the day after your husband, the defendant in this case, Izell Postom, had been arrested? A. Yes; I think it was.

Q. And was that conversation relative to your husband's whereabouts on --

MR. WEEKS: Objection.

THE COURT: Well, let's get the question first.

BY MR. BLACKWELL:

Q. (Continuing) -- relative to your husband's whereabouts on the night of April the 19th?

THE COURT: Now, do you want to make your objection?

MR. WEEKS: Yes, Your Honor.

8 MR. BLACKWELL: I think the defense wants to object, I believe.

Are you objecting?

THE COURT: Are you objecting to it?

MR. WEEKS: I am objecting to her testifying.

THE COURT: I am going to overrule it at this stage.

MR. WEEKS: Very well.

THE COURT: All right, go ahead.

MR. BLACKWELL: Shall I proceed with the next question, Your Honor?

THE COURT: You may proceed with your next question.

BY MR. BLACKWELL:

Q. Did you at that time sign a statement and affirm under oath before a notary as to the whereabouts of your husband on April the 19th, 1962, Mrs. Postom?

MR. WEEKS: I have to object to this.

THE COURT: Come to the bench.

(At the bench:)

MR. WEEKS: The way Mr. Blackwell put that question we might as well go on --

THE COURT: No; I think we have got to the point where I am going to sustain the objection.

MR. BLACKWELL: Very well, Your Honor.

THE COURT: Because up to this time there has been no testimony either for or against, but I think now you have come to this question and she has answered under oath. I am going to sustain the objection. I am now going to instruct her what the statute is and then I am going to instruct her that she cannot testify because of your objection.

MR. BLACKWELL: Thank you, Your Honor.

(In open Court:)

THE COURT: Mrs. Postom, do not answer that question until you first hear me out.

Under the statutes of the District of Columbia in a criminal proceeding a wife is competent but not compellable to testify for or against a husband. You would be permitted to testify against your husband or for your husband, as you saw fit, but in this instance you may not do so because of objection by the defendant, and therefore your answer may not be had.

MR. BLACKWELL: In view of Your Honor's ruling the Government will not ask any further questions of this witness, Your Honor. However, may we approach the bench, Your Honor?

THE COURT: Yes.

(At the bench:)

MR. BLACKWELL: Do I understand, Your Honor, that Your Honor will not inquire as to whether or not she desires to testify; it is just the fact that the defendant has objected?

THE COURT: No; because once they have objected, whether she desires to or not is irrelevant, as I construe the Hawkins case.

MR. BLACKWELL: Which case is that?

THE COURT: Hawkins versus The United States. It is Hawkins v. United States, 358 U.S. 74. It was decided in 1958, by Mr. Justice Black. I am aware of the fact that this was not under consideration. As far as I can tell there was not any particular

statute under consideration, but it was the common-law rule. It might be said there is a derogation of common law; I do not know, but this is too serious a thing.

MR. BLACKWELL: But what we have proceeded on, we have argued that applied to a jurisdiction where they did not have a statute such as we have in the District of Columbia.

THE COURT: I say I am taking that into consideration too. However, where there are statutes similar to the District of Columbia there is a split among the States, and in a crime of as serious nature as this, I am not going to let this be the test case. I am going to do, well, what I have already done.

MR. WEEKS: We are not ready for instructions yet. We will
11 ask for an instruction on this.

THE COURT: You will have a problem on that too. You better write one up because we don't want to be fooling around with words, and you too, Mr. Blackwell, if you are going to have any instruction, I think you better write that.

MR. BLACKWELL: Very well, Your Honor.

THE COURT: I assume you did not want to examine the witness?

MR. WEEKS: No.

(In open Court:)

THE COURT: May Mrs. Postom be excused in the light of the ruling of the Court. Do I understand that is the desire of counsel?

MR. BLACKWELL: In light of the Court's ruling the Government has no alternative and no further use for Mrs. Postom.

THE COURT: And there is no cross-examination as far as the defendant is concerned?

MR. WEEKS: No, Your Honor.

THE COURT: Mrs. Postom, you are excused.

(Witness was excused.)

* * * * *

[Filed December 3, 1962]

JUDGMENT AND COMMITMENT

On this 30th day of November, 1962 came the attorney for the government and the defendant appeared in person and by counsel, John Shorter, Jr., Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of CARNAL KNOWLEDGE as charged in count two, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years to Fifteen (15) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ W.B. Jones
United States District Judge

[Filed December 7, 1962]

NOTICE OF APPEAL

Name and address of appellant: Izell J. Postom
D.C. Jail

Name and address of appellant's attorney: Maurice R. Weeks
615 G St., N.W.

John A. Shorter, Jr.
508 5th St., N.W.

Offense: Carnal Knowledge

Concise statement of judgment or order, giving date, and any sentence:

Jury verdict of guilty as charged, sentenced on November 30, 1962 to a term of 5 to 15 years imprisonment.

Name of institution where now confined, if not on bail: D.C. Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date: Dec. 5, 1962

/s/ Izell J. Postom
Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17487

IZELL J. POSTOM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
WILLIAM C. PRYOR,
Assistant United States Attorneys.

No. 17487

QUESTION PRESENTED

Where appellant's wife was called as a witness by the prosecutor but prevented from testifying upon appellant's objection, was it not proper to decide the question of marital privilege in open court?

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INDEX

	Page
Counterstatement of the case	1
Statutes involved	3
Summary of argument	4
Argument:	
Appellant's wife was a competent witness; the Court could properly rule on the assertion of privilege in the course of regular proceedings	4
Conclusion	6

TABLE OF CASES

Commercial Credit Co. v. *McReynolds*, 68 app. D.C. 43, 68 F. 2d 990 (1934)	4
Funk v. *U.S.*, 290 U.S. 371, 54 S.Ct. 212 (1933)	4
Halback v. *Hill*, 49 App. D.C. 127, 261 F. 1007 (1919)	4
Hawkins v. *United States*, 358 U.S. 74, 79 S.Ct. 136 (1958)	4
Namet v. *United States*, —— U.S. —— (No. 134, Oct. Term, 1962, decided May 13, 1963)	5
Richardson v. *State*, 195 Md. 126, 72 A. 711 (1906)	5
Stein v. *Bowman*, 38 Pet. 209, 10 S.Ct. 207 (1839)	4

OTHER REFERENCES

H.R. 9835, Rept. No. 1017, 56th Congress, 1st Sess	4
Md. Code Ann., Art. 35, Sec. 4 (1939)	4
8 Wigmore, Evidence, Secs. 488, 2245 (3d Ed. 1940)	4
38 Va. L. Rev. 359 (1952)	5

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17487

IZELL J. POSTOM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed June 4, 1962 charged appellant with rape and carnal knowledge (22 D.C.C. 2801) (J.A. 1).[1] After trial by jury, he was found guilty of the latter offense. By judgment and commitment filed December 3, 1962, appellant was sentenced to imprisonment for a period of five to fifteen years (J.A. 9). This appeal followed.

At trial, Patricia J. Hall, the fifteen-year-old victim of this sexual assualt, related that on the evening of April 19, 1962 she had been a baby-sitter for a cousin in Northeast Washington (Tr. 27). Shortly before 9:00 P.M. she hailed a taxi and stated her destination to the driver (Tr. 31). She intended going to her aunt's residence at 160 56th Place, Southeast. Instead of taking a direct route to the address given, "* * * [the driver] went as if he didn't know where he was going" (Tr. 31). After further directions and more driving, the operator of the car, later identified as appellant,

[1] On June 29, 1962, appellant was granted a severance.

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Appellant's defense was alibi. He and several members of his church testified he was at church at the time the crime was perpetrated.

One of the rebuttal witnesses called by the prosecution was appellant's wife, Isabelle Postom. After a discussion at the bench relating to her statutory privilege (J.A. 2–5), she was permitted to answer certain preliminary questions—residence, relationship to the appellant and conversations with Detective Wolfgang (J.A. 5)—before appellant objected to her testifying (J.A. 6). The objection was sustained and the witness excused (J.A. 8). At the close of all the evidence, the jury returned a verdict of guilty as to carnal knowledge.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2801 provides:

> Rape. Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

Title 14, District of Columbia Code, Section 306 provides:

> *Husband and wife competent but not compellable witnesses.* In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other.

SUMMARY OF ARGUMENT

Under the provisions of the District of Columbia Code appellant's wife was a competent witness. It was therefore proper that the question of marital privilege be determined in open court.

ARGUMENT

Appellant's wife was a competent witness; the Court could properly rule on the assertion of privilege in the course of regular proceedings

Appellant contends the Court committed reversible error in permitting appellant's wife to be called as a witness for three or four preliminary questions before it sustained an objection to her further testimony on the ground of marital privilege. In a jurisdiction which follows the strict common-law rule forbidding one spouse to testify for or against the other, *Hawkins* v. *United States*, 358 U.S. 74, 79 S.Ct. 136 (1958), cited by appellant, would be appropriate authority for the position.[2] However, the *Hawkins* case, *supra*, acknowledges that the rule has been substantially modified by statute in many states. See 8 Wigmore, Evidence Sections 488, 2245 (3d Ed. 1940). Such modification was enacted by Congress for the District of Columbia. Title 14, D.C.C., § 306 provides:

> In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other.

The plain meaning of the language used reveals a departure from the common-law rule. *Halback* v. *Hill*, 49 App. D.C. 127, 261 F. 1007 (1919); *Commercial Credit Co.* v. *McReynolds*, 68 App. D.C. 43, 68 F. 2d 990 (1934). The legislative history indicates a Congressional intent to change the rule. The House Report accompanying the bill shows it was intended to adopt the law existent in the State of Maryland. H.R. 9835, Report No. 1017, 56th Congress, 1st Sess. And the Maryland statute, in turn, Md. Ann. Code of Gen. Laws, Art. 35, Sec.

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4 (1939), is deemed to have abolished the former disqualification. *Richardson* v. *State,* 195 Md. 126, 72 A. 711 (1906). See also Note, 38 Va. L. Rev. 359, 364 (1952).[3]

In sum, our statute provides that a spouse is a competent but not compellable witness. It was therefore not error to call appellant's wife as a witness though she did not testify as to the merits. Appellant got more than he was entitled to since the witness was excused without substantial and damaging testimony, on appellant's objection, and without determining her wishes in the matter (J.A. 7). Indeed, it is not settled that appellant has the right to invoke the privilege. In passing the statute, Congress was dealing with trial procedure in both civil and criminal cases. And in the context of the language used, it is unlikely the word, "compellable" was intended to be available to a defendant to suppress otherwise valid evidence. Clearer expression by Congress should be required before such an extreme view is read into a general competency statute touching both civil and criminal litigation.

It should be noted that the intended assertion of a valid privilege does not obviate the necessity for actual claim of it in open court.[4] An identical argument of undue prejudice was recently rejected by the Supreme Court in *Namet* v. *United States,* —— U.S. —— (No. 135, Oct. Term, 1962; decided May 13, 1963). Finally, appellant was further protected by ample jury instructions, some of which were submitted by the appellant.

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"* * * over half of the states provide that husband and wives are competent witnesses against one another in all criminal cases and may testify as to any occurrences which do not infringe upon the confidential communications privilege * * *"

The Maryland Statute was cited as an example of the modern trend. Section 306, *supra,* is substantially similar to the Maryland statute.

[4] Assuming *arguendo* there was prejudicial error in invoking the privilege in the jury's presence, certainly it was not reversible error.

CONCLUSION

Wherefore, it is submitted the judgment of the District Court be affirmed.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17487

IZELL J. POSTOM, APPELLANT 26

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
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No. 17487

QUESTION PRESENTED

Where appellant's wife was called as a witness by the prosecutor but prevented from testifying upon appellant's objection, was it not proper to decide the question of marital privilege in open court?

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INDEX

	Page
Counterstatement of the case	1
Statutes involved	3
Summary of argument	4
Argument:	
Appellant's wife was a competent witness; the Court could properly rule on the assertion of privilege in the course of regular proceedings	4
Conclusion	6

TABLE OF CASES

Commercial Credit Co. v. *McReynolds*, 68 app. D.C. 43, 68 F. 2d 990 (1934)	4
Funk v. *U.S.*, 290 U.S. 371, 54 S.Ct. 212 (1933)	4
Halback v. *Hill*, 49 App. D.C. 127, 261 F. 1007 (1919)	4
Hawkins v. *United States*, 358 U.S. 74, 79 S.Ct. 136 (1958)	4
Namet v. *United States*, —— U.S. —— (No. 134, Oct. Term, 1962, decided May 13, 1963)	5
Richardson v. *State*, 195 Md. 126, 72 A. 711 (1906)	5
Stein v. *Bowman*, 38 Pet. 209, 10 S.Ct. 207 (1839)	4

OTHER REFERENCES

H.R. 9835, Rept. No. 1017, 56th Congress, 1st Sess	4
Md. Code Ann., Art. 35, Sec. 4 (1939)	4
8 Wigmore, Evidence, Secs. 488, 2245 (3d Ed. 1940)	4
38 Va. L. Rev. 359 (1952)	5

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COUNTERSTATEMENT OF THE CASE

An indictment filed June 4, 1962 charged appellant with rape and carnal knowledge (22 D.C.C. 2801) (J.A. 1).[1] After trial by jury, he was found guilty of the latter offense. By judgment and commitment filed December 3, 1962, appellant was sentenced to imprisonment for a period of five to fifteen years (J.A. 9). This appeal followed.

At trial, Patricia J. Hall, the fifteen-year-old victim of this sexual assualt, related that on the evening of April 19, 1962 she had been a baby-sitter for a cousin in Northeast Washington (Tr. 27). Shortly before 9:00 P.M. she hailed a taxi and stated her destination to the driver (Tr. 31). She intended going to her aunt's residence at 160 56th Place, Southeast. Instead of taking a direct route to the address given, "* * * [the driver] went as if he didn't know where he was going" (Tr. 31). After further directions and more driving, the operator of the car, later identified as appellant,

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